STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(MARKEY, P.J., CAVANAGH, AND GRIFFIN, J.J.)
AND THE WORKER'S COMPENSATION APPELLATE COMMISSION

DAVID SANCHEZ,

Plaintiff-Appellant/
Cross-Appellee,

v

EAGLE ALLOY, INC.,
a Self-Insured,

Defendant-Appellee/
Cross-Appellant,

and
SECOND INJURY FUND (DUAL
EMPLOYMENT PROVISIONS),

Defendant-Appellee/
Cross-Appellant.

S.C. NO.: 123114

C.A. NO.: 238003

WCAC NO.: 00-0248

ALEJANDRO VAZQUEZ,

Plaintiff-Appellant/
Cross-Appellee,

v

EAGLE ALLOY, INC.,
a Self-Insured,

Defendant-Appellee/
Cross-Appellant.

/

S.C. NO.: 123115

C.A. NO.: 239592

WCAC NO.: 01-0182

AMICUS CURIAE BRIEF OF MICHIGAN SELF-INSURERS' ASSOCIATION

SUBMITTED BY:

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STATEMENT OF FACTS

(Numbers in parentheses refer to the pages of Appellants' Appendix).

The plaintiffs in these consolidated cases have no legitimate right to work in the United States and they committed crimes by using false documents to illegally obtain employment here (132a; 123a; 108a-109a; Plaintiffs' Joint Brief on Appeal, p 21). After becoming employed with defendant-Eagle Alloy, Inc. [hereinafter Eagle] on the basis of false documents, each plaintiff suffered an injury "arising out of and in the course of" their work (124a).

Plaintiff-Sanchez, after a period of convalescence, returned to work for Eagle after his injury (6a; 124a; 20a). Eagle terminated him after Eagle received notice from the Social Security Administration that his social security number was invalid. *Id.* Mr. Sanchez then obtained subsequent work, despite his undocumented alien status, from a different employer through a temporary hiring agency and was still working there at the time of the instant trial (20a; 53a). Mr. Sanchez did not earn as much post-injury as he had earned pre-injury (46a).

Plaintiff-Vazquez also returned to work for Eagle following his work injury (62a). Eagle terminated him for failing to adhere to its attendance policy. *Id.* Subsequent to working for Eagle, Mr. Vazquez – despite his undocumented status – obtained work through three different temporary work agencies (62a). He lost his job at the first agency when it learned he was an undocumented alien (63a). He quit another job alleging pain related to his work injury (63a). He worked for another temporary agency until he was laid off and he remained laid off through the time of the instant trial (64a). Mr. Vazquez implicitly earned less money at his subsequent work than he had earned for Eagle (73a; 56a).

Both plaintiffs applied for workers' compensation benefits, including weekly wage loss benefits.

Magistrate Donna Grit tried both cases separately. The Magistrate found each plaintiff demonstrated a work-related injury, but suspended continuing weekly wage loss benefits per the last sentence of MCL 418.361(1).

Eagle appealed each case. With respect to Mr. Sanchez's appeal, the Worker's Compensation Appellate Commission disagreed with the Magistrate's analysis. The Commission remanded the case, while retaining jurisdiction, directing the Magistrate to determine, under MCL 418.301(4),[1] whether "any" of Mr. Sanchez's loss was related to his injury or whether it was related to his undocumented status (40a). On remand, the Magistrate applied the Court of Appeals' analysis in *Sington v Chrysler Corporation*, 245 Mich App 535; 630 NW2d 337 (2001), *rev'd* 467 Mich 144; 648 NW2d 624 (2002). The Magistrate then granted Mr. Sanchez ongoing weekly benefits. When the case returned to the Commission following the remand (still prior to this Court's *Sington* decision), the Commission affirmed the award concluding Mr. Sanchez's immigration status was not the "only reason for plaintiff's loss of wages." (52a).

With respect to the appeal in Mr. Vazquez's case, the Commission resolved the appeal *en banc*.[2] A majority of the Commission agreed with the Magistrate that Mr. Vazquez's weekly wage loss benefits were suspended by operation of the last sentence of MCL 418.361(1).

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[1] This two-sentence provision recites the Worker's Disability Compensation Act's general definition of disability. At the time of the Commission's remand, the lead case from this Court interpreting § 301(4) was *Haske v Transport Leasing, Inc., Indiana*, 455 Mich 628; 566 NW2d 896 (1997). This Court overruled *Haske* in part in *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002).

[2] The Commission normally resolves cases in panels of three. For cases that may set a precedent, the Commission may resolve the case *en banc*. MCL 418.274(9).

Both cases were appealed to the Court of Appeals and there consolidated. The Court of Appeals resolved four issues in ruling on the matter. First, the Court rejected Eagle's argument that plaintiffs, being illegal aliens, were not "employees" within the meaning of MCL 418.161(1)(*l*). Second, the Court rejected Eagle's argument that there were no valid contracts of hire between Eagle and plaintiffs. Third, the Court agreed with the *en banc* Commission majority and the Magistrate that weekly benefits were suspended by operation of the last sentence of MCL 418.361(1). Fourth, the Court held such suspension of weekly benefits began when Eagle discovered and confirmed plaintiffs' illegal employment status (133a). The Court noted the suspension ends if plaintiffs "obtain proper permission to live and work in the United States." (133a).

In response to plaintiffs' appeals and Eagle's cross-appeal, this Court granted leave. The Court in the order invited *amicus curiae* participation.

This is the Michigan Self-Insurers' Association's *amicus curiae* brief.

ARGUMENT

PRESENTLY, PLAINTIFFS CANNOT LEGALLY WORK IN THE UNITED STATES BECAUSE THEY ARE UNDOCUMENTED ALIENS. AND, PLAINTIFFS HAD PREVIOUSLY COMMITTED CRIMES BY USING FALSE DOCUMENTS TO ILLEGALLY OBTAIN EMPLOYMENT IN THIS COUNTRY. UNDER SUCH CIRCUMSTANCES, THE COURT OF APPEALS CORRECTLY DENIED ONGOING WEEKLY BENEFITS BECAUSE PLAINTIFFS HAVE NO LEGALLY RECOGNIZED WAGE EARNING CAPACITY OR WAGE LOSS TO BE COMPENSATED UNDER MCL 418.301(4). ALTERNATIVELY, EVEN IF ELIGIBLE FOR ONGOING WEEKLY BENEFITS UNDER § 301(4), PLAINTIFFS' WEEKLY BENEFITS ARE SUSPENDED BECAUSE THEY ARE "UNABLE TO OBTAIN OR PERFORM WORK BECAUSE OF ... COMMISSION OF A CRIME" UNDER MCL 418.361(1)'S LAST SENTENCE.

Employers should not be required to compensate the wage loss of claimants who have no legitimate wage earning capacity in this country and who have no legally-based expectation of earning wages in this country. The Michigan Self-Insurers' Association [MSIA] urges the Court, therefore, to affirm the Court of Appeals' result. MSIA urges reference to *Sweatt v Department of Corrections*, 468 Mich 172; 661 NW2d 201 (2003) and *Sweatt*'s discussion of two "interrelated" statutes, the definition of disability in MCL 418.301(4)[3] and

[3] This statute reads: "As used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss."

MCL 418.361(1)[4]. Applying that analysis here, once plaintiffs' illegal employment status in this country was discovered and confirmed, plaintiffs lost their capacity to earn wages in this country. Their lost wage earning capacity from that point forward was not "resulting from" their work injuries but from their inability to legally work here. MCL 418.301(4) [first sentence]. And, plaintiffs no longer have actionable "wage loss" in this country because they have no legal wages to lose. *Id.* [second sentence]. Plaintiffs' loss of "wage earning capacity" and "wage loss" is now entirely because of their illegal employment status. MCL 418.301(4).

Even if these elemental § 301(4) eligibility considerations are set aside here, plaintiffs entitlement to weekly benefits should nevertheless be barred because, upon discovery and confirmation of their crimes, plaintiffs became "unable to obtain or perform work because of ... commission of a crime" and, for that reason, their weekly benefits are suspended via application of the last sentence of MCL 418.361(1).

A. MSIA Focuses On The Third Question Posed In This Court's Order Granting Leave.

MSIA respectfully suggests the third question posed in this Court's order granting leave serves as the appropriate basis to resolve the question of plaintiffs' entitlement to weekly benefits. That third question relates to § 361(1) and to the "interrelated questions" in § 361(1) and the definition of disability in § 301(4) and *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002). *Sweatt, supra* at 190-191 n 13.

[4] This statute reads: "While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime."

B. What Is The Precedential Effect Of *Sweatt*, If Any?

In considering the § 361(1) and § 301(4) questions now before it, the Court is not writing on a blank slate. Last year, the Court addressed these questions in *Sweatt*. *Sweatt* had not been decided at the time the Court of Appeals issued its opinion in this matter and, perhaps for that reason, the parties have largely ignored it in briefing. But, *Sweatt* must be considered.

Sweatt was a split decision. Justice Markman authored the lead opinion, with Chief Justice Corrigan and Justice Taylor concurring, and Justice Young concurring "in the result only." *Sweatt* at 191. Justice Cavanagh dissented, with Justice Weaver and Justice Kelly concurring. Under such circumstances, the threshold question is: what, if any, precedent was created by *Sweatt*?

Case law suggests *Sweatt* is precedent with respect to "the result only." *Id.* In *Negri v Slotkin*, 397 Mich 105; 244 NW2d 98 (1976), while discussing *stare decisis* in a different context, the Court noted:

> In [*People v*] *Thomas* [387 Mich 368; 197 NW2d 51 (1972)] the Court split 3-3-1. Justice BLACK concurred in the result reached by Justices BRENNAN, WILLIAMS and ADAMS. Thus there was a majority only with regard to the result which was to affirm the trial court. *Negri*, *supra* at 109.

Compare also, *Beaudrie v Anchor Packing Co*, 206 Mich App 245, 249; 520 NW2d 716 (1994); *Felsner v McDonald Rent-A-Car*, 193 Mich App 565, 569; 484 NW2d 408 (1992). An analogous question presented itself in *Myers v Genesee County Auditor*, 375 Mich 1; 133 NW2d 190 (1965). There, two Justices signed the lead opinion, a third Justice "concurred in result" writing no opinion, and two Justices wrote an opinion "join[ing] in the result." *Id.* at 12-13. The following year in *Keenan v County of Midland*, 377 Mich 57, 60; 138 NW2d 759 (1966), the

Court considered the precedential effect, if any, created by *Myers*. *Keenan* said "a clear majority" made a precedential ruling "by reversing and remanding [*Myers*] for trial".[5]

With the above in mind, Justice Young's concurrence "in the result only" of Justice Markman's lead opinion in *Sweatt* means four Justices agreed on that result. That makes it precedent or, at minimum, a point of departure for discussing the instant case.

The question then becomes: what was the *Sweatt* "result"? The result in *Sweatt* is recited in the "Conclusion" portion of the lead opinion as follows:

> Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the magistrate to determine to what extent, if any, plaintiff's loss of wage-earning capacity is because of a work-related injury, and, to what extent, if any, plaintiff's loss of wage-earning capacity is because of the "commission of a crime."[13]
>
> [13] The dissent repeatedly states that the magistrate has already determined that plaintiff is disabled. However, the magistrate originally found plaintiff to be disabled as defined in *Haske v Transport Leasing, Inc*, 455 Mich 628, 634; 566 NW2d 896 (1997). This Court has since overruled *Haske*. See *Sington*, *supra* at 161. Accordingly, on remand, the magistrate is to determine whether plaintiff is disabled as defined in *Sington*, *supra* at 158. That is, if the magistrate determines that plaintiff's loss of wage-earning capacity is wholly attributable to his "commission of a crime," the magistrate must conclude that plaintiff is not disabled because, under *Sington*, *supra* at 158, there must be a link between the work-related injury and the loss of wage-earning capacity. If the magistrate, however, determines that plaintiff's loss of wage-earning capacity is wholly attributable to his work-related injury, the magistrate must conclude that plaintiff is disabled and entitled to benefits. Finally, if the magistrate determines that plaintiff's loss of wage-

[5] MSIA does not find case law entirely clear on this subject, however. Some cases suggest a majority formed by a concurrence in result does not constitute precedent. *People v Jackson*, 390 Mich 621, 627; 212 NW2d 918 (1973) and *People v Anderson*, 389 Mich 155, 171; 205 NW2d 461 (1973).

> earning capacity is partly attributable to his work-related injury and partly attributable to his "commission of a crime," the magistrate must conclude that plaintiff is disabled and entitled to benefits for the portion of his loss of wage-earning capacity that is attributable to his work-related injury, but is not entitled to benefits for the portion of his loss of wage-earning capacity that is attributable to his "commission of a crime."
>
> The dissent states that it is inappropriate to remand this case for a redetermination of disability under *Sington* because defendant has never contested plaintiff's disability. *Post* at 4 n 2. Although defendant has not specifically contested plaintiff's disability, defendant has specifically contested its duty to pay plaintiff differential benefits in light of plaintiff's "commission of a crime." As explained above, if plaintiff's loss of wage-earning capacity is wholly attributable to his "commission of a crime," plaintiff is not disabled under *Sington*. In other words, whether defendant must pay plaintiff differential benefits in light of plaintiff's "commission of a crime," and whether plaintiff is disabled, are two interrelated questions that must be addressed on remand. *Sweatt*, *supra* at 190-191.

The questions now before the Court similarly relate to claimants' eligibility and receipt of weekly wage loss benefits where they have committed crimes adversely affecting their employability. This is a difficult area of workers' compensation law, as the Court's struggle in *Sweatt* indicated. MSIA submits *Sweatt*'s result is the proper framework for consideration of these questions. Even if the *Sweatt* ruling is not binding precedent as a technical matter, its recent exploration of this difficult area last year should be the starting point for analysis.

C. The Essential Points Of *Sweatt*'s Result For Purposes Of The Instant Cases.

If weekly benefits are not payable under MCL 418.301(4), then there is obviously no necessity to consider whether weekly benefits are to be suspended under MCL 418.361(1). Recognizing this, *Sweatt* correctly said before one considers whether weekly benefits are

suspended by application of the last sentence of § 361(1), one must first consider whether weekly wage loss benefits are payable under § 301(4). *Sweatt* at 190-191 n 13.

Sweatt then explains that weekly wage loss benefits under § 301(4) are not payable if "plaintiff's loss of wage-earning capacity is wholly attributable to his 'commission of a crime.'" *Sweatt*, *supra* at 190 n 13. Weekly benefits are not owing under such a circumstance for the rudimentary reason that "plaintiff is not disabled because, under *Sington*, *supra* at 158, there must be a link between the work-related injury and the loss of wage-earning capacity." *Id.* *Sweatt* cites that portion of *Sington* which says: " ... [A] worker's compensation magistrate or the WCAC should consider whether the injury has *actually resulted* in a loss of wage earning capacity". *Sington*, *supra* at 158 (emphasis added). This linkage requirement between limitation of wage earning capacity and injury is demanded by the first sentence of § 301(4) where disability is defined as:

> ... a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training *resulting from* a personal injury or work related disease. MCL 418.301(4) [first sentence] (emphasis added).[6]

Sweatt also explains that, conversely, where the "plaintiff's loss of wage-earning capacity is wholly attributable to his work-related injury," then "plaintiff is disabled and entitled to benefits." *Sweatt*, *supra* at 191 n 13. *Sweatt* implies under such circumstance there is no need to consider § 361(1)'s suspension of benefits because the § 361(1) question is already answered in the employee's favor.

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[6] *Haske*, overruled in part by *Sington*, had also recognized a linkage requirement, albeit reading it into the second sentence of § 301(4). *Haske*, *supra* at 661. *Haske*'s recognition that linkage between injury and lost wages is necessary led *Sington* to overrule *Haske* only in part, *i.e.*, *Sington* overruled *Haske* on how to determine "limitation of an employee's wage earning capacity".

Sweatt emphasized, therefore, that the pivotal question is: "what extent, if any, plaintiff's loss of wage-earning capacity is because of a work-related injury, and, to what extent, if any, plaintiff's loss of wage-earning capacity is because of the 'commission of a crime'". *Sweatt*, at 190. The answer to that question answers *both* the threshold § 301(4) question and, if necessary, the § 361(1) suspension question. There may or may not be a § 361(1) question presented. There is only a § 361(1) question "if ... plaintiff's loss of wage-earning capacity is partly attributable to his work-related injury and partly attributable to his 'commission of a crime'". *Sweatt, supra* at 191 n 13. This partial attribution of the claimant's loss of wage earning capacity to the injury and partial attribution to a crime requires apportionment. *Id.* The necessity for apportionment is most likely the reason the Legislature placed this apportionment inquiry in the partial disability provision of the Worker's Disability Compensation Act, MCL 418.361(1), rather than elsewhere.

Pertinent to the instant cases as well is *Sweatt*'s result insofar as it says, if § 361(1) is reached, the phrase "unable to obtain or perform work" in § 361(1) is not employer-specific. That is, the claimant's inability "to obtain or perform work" for *just* the injury-employer does not, standing alone, trigger suspension. *Sweatt*'s result also reveals it is not necessary the crime preclude *all* work, just *some* work, because *Sweatt* was remanded for a possible apportionment. Mr. Sweatt – like the instant plaintiffs – had obtained and had performed work for other employers post-injury.

Finally, *Sweatt* explains that § 361(1)'s requirement that the inability to obtain or perform work be "because of" a crime does not mean the crime must be the *only* reason for an

inability to obtain or perform work.[7] Section 361(1) assumes, per *Sweatt*'s result, the crime *and* the work injury both adversely affect the claimant's employability.

D. Although Pre-*Sweatt*, The Court of Appeals' Result Reflects Correct Application Of *Sweatt*'s Result.

The Court of Appeals' ruling in this matter predated this Court's *Sweatt* decision.[8] For that reason, while the Court of Appeals' decision naturally does not perfectly reflect *Sweatt*'s analysis, the Court of Appeals' result (and the Court's agreement with the Magistrate and the *en banc* Commission panel) sufficiently answers the *Sweatt* inquiries. Therefore, this Court should affirm the Court of Appeals' result.

The Court of Appeals recognized, relying on *Hoffman Plastic Compounds, Inc v National Labor Relations Board*, 535 US 137; 122 S Ct 1275; 152 L Ed 2d 271 (2002), that "undocumented aliens are not legally authorized to work in the United States." (131a). A loss of wage earning capacity wholly attributable to the discovery and confirmation of the instant plaintiffs' illegal status means there is no link between the work injury and a lost wage earning capacity. See, *Sweatt*, at 190 n 13; *Sington* at 158. Plaintiffs have no capacity to earn here because they cannot legally work here. Where a legal wage earning capacity does not exist, there is no wage earning capacity for Eagle to replace or compensate by weekly wage loss benefits. Workers' compensation benefits were not designed to compensate those whose unemployment is not attributable to the work injury but to a non-injury related reason.[9] The inability to legally work in this country is such a non-compensable, non-injury related reason.

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[7] Should loss of wage earning capacity be solely because of the crime, then the claimant is not disabled under § 301(4) and no § 361(1) suspension question need be considered.

[8] The trial in this matter also predated the Court's decision in *Sington*.

[9] *Sweatt* (Opinion of MARKMAN, J.) at 185-186. See also, *Sobotka v Chrysler Corp*, 447 Mich 1, 26; 523 NW2d 454 (1994); *Lauder v Paul M. Wiener Foundry*, 343 Mich 159; 72 NW2d 159 (1955); *Fawley v Doehler-Jarvis Div of National Lead Co*, 342 Mich 100; 68 NW2d 768 (1955); *Wieland v Dow Chemical Co*, 334 Mich 427; 54 NW2d 708 (1952); *Simpson v Lee & Cady*, 294 Mich 460; 293 NW 718 (1940).

Recall as well the second sentence of § 301(4) says "wage loss" cannot be presumed even if there is disability. Here, in the language of the second sentence of § 301(4), there is no legally recognized "wage loss" because, upon discovery and confirmation of their illegal employment status, plaintiffs no longer have wages to lose. Their status is similar to the status of the claimant in the following example given in *Sington*:

> For example, an employee might suffer a serious work-related injury on the last day before the employee was scheduled to retire with a firm intention to never work again. In such a circumstance, the employee would have suffered a disability, i.e., a reduction in wage earning capacity, but no wage loss because, even if the injury had not occurred, the employee would not have earned any further wages. *Sington*, *supra* at 160.

Likewise here, plaintiffs cannot earn further wages legally from Eagle, nor can they legally do so elsewhere in this country. There is therefore no wage loss for Eagle to replace or compensate.[10]

The Court of Appeals specifically held plaintiffs' undocumented status precluded Eagle from legally retaining plaintiffs as employees and legally finding them work elsewhere and, for that reason, plaintiffs became "unable to obtain or perform work because of commission of a crime." That reason is now the only reason for their absence of a wage earning capacity. The Court of Appeals' reasoning, while cast in pre-*Sweatt* § 361 terms rather than § 301(4) terms, answers the pivotal remanded question articulated in *Sweatt*. The Court of Appeals said:

> We hold that the magistrate correctly reasoned that plaintiffs' admitted use of fake documents to obtain employment constituted "commission of a crime."

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[10] Plaintiffs suggest in briefing their wage earning capacity in Mexico may be adversely affected. (Plaintiff's Joint Brief on Appeal, p 38). Even if such an extra-United States consideration is legitimate, plaintiff did not so prove below. It has always been plaintiff who bears the burden of proving disability. *Pulley v Detroit Engineering & Machine Co*, 378 Mich 418, 427; 145 NW2d 40 (1966); *Brannan v Fisher Body Corp*, 277 Mich 139, 141; 268 NW2d 839 (1936); *Woodcock v Dodge Brothers*, 213 Mich 233, 235; 181 NW 970 (1921). It is not the employer's burden to prove an injury did not adversely affect the claimant's wage earning capacity as plaintiff implies. *Brannan*, *supra* at 141; *Stefanik v Great Atlantic & Pacific Tea Co*, 125 Mich App 160, 162-163; 335 NW2d 655 (1983).

> We further hold that the magistrate correctly reasoned that when defendant learned of plaintiffs' employment status and could not legally retain them as employees or find them other work, plaintiffs became unable to obtain or perform work "because of" the commission of crime within the meaning of section 361(1).
>
> ... If plaintiffs obtain proper permission to live and work in the United States, then section 361(1) would no longer operate to suspend their wage loss benefits. (132a-133a).

This ruling reflected the Court of Appeals' agreement with the underlying factfinding made by the Magistrate in both cases and the *en banc* panel of the Worker's Compensation Appellate Commission in Mr. Vazquez's case.[11] The Court of Appeals' ruling also correctly reflects *Sweatt*'s point that § 361 is not employer-specific. The Court of Appeals said plaintiffs are not employable at Eagle *or elsewhere*. As a consequence, the Court of Appeals holds, in effect, plaintiffs' missing "wage earning capacity" is now wholly attributable to their illegal employment status and they have no actionable "wage loss." MCL 418.301(4). This ruling comports with *Sweatt*. And, it comports with *Sington*'s § 301(4) analysis which requires consideration of "'the continuing availability of work'" in assessing the limitation of wage earning capacity in § 301(4). *Sington* at 157, quoting *Pulley*, *supra*. Here no legal work is "available" to plaintiffs because of their illegal employment status.[12]

Even if § 301(4)'s requirements were bypasssed and the question presented is only whether plaintiffs' eligibility for weekly benefits under § 301(4) is suspended by § 361(1),

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[11] Somewhat in contrast, the Commission in Mr. Sanchez's case had found his illegal status was not the "only reason for plaintiff's loss in wages." (57a).

[12] Plaintiffs' post-injury procurement of work, which must be illegal since they remain undocumented, should not defeat this proposition, else plaintiffs are rewarded for continuously breaking this country's laws. (Compare, Chairperson Skoppek's concurring note in *Vazquez* at 107a).

the result is the same.[13] The discovery and confirmation of plaintiffs' crimes have now rendered plaintiffs "unable to obtain or perform work because of ... commission of a crime." MCL 418.361(1). That inability to legally work is complete and, therefore, weekly benefits are completely barred. To hold otherwise is to say plaintiffs can deprive Eagle of the statutory right to mitigate its liability for wage loss benefits. An employer is entitled to mitigate their weekly wage loss indemnity created by § 301(4) by offering "reasonable employment" [f/k/a favored work], *i.e.* less demanding work outside the claimant's pre-injury qualifications and training or lesser paying work within their pre-injury qualifications and training. See, MCL 418.301(4)-(9). But, given plaintiffs undocumented status, if Eagle returned plaintiffs to work at Eagle, then Eagle would be breaking the law. 8 USC 1324a(a)-(f).

The historical context of § 361(1) should be considered in this regard. The lead *Sweatt* opinion correctly noted the Legislature enacted the last sentence of § 361(1) to alter the result of such decisions as *Sims v R D Brooks, Inc*, 389 Mich 91, 93; 204 NW2d 139 (1973). *Sweatt* at 174 n 1. *Sims* had deprived employers of their mitigation remedy because the injured claimant there committed a crime, was imprisoned, and could not be returned to favored work. The fact that it was the claimant's criminal act which robbed the employer of its ability to reduce its weekly indemnity made *Sims* especially abhorrent. The legislative objective to change that state of affairs is fully realized by the Court of Appeals' ruling here. Eagle cannot mitigate its liability by returning plaintiffs to work because of plaintiffs' crimes. Eagle has no mitigation

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[13] Plaintiffs suggest in briefing that § 361(1), enacted in 1985, should not be understood to apply to violations of the Immigration Reform and Control Act (IRCA) enacted in 1986. Section 361(1) is being applied to weekly compensation for periods of time well after 1986 and, therefore, IRCA is relevant. *Cf., Lahti v Fosterling*, 357 Mich 578; 99 NW2d 490 (1959); *Franklin v Ford Motor Co*, 197 Mich App 367; 495 NW2d 802 (1992). There is no suggestion the Legislature froze § 361(1)'s application to "crimes" as of 1985. In any event, well before enactment of the IRCA, it has been a crime to falsify information in relationship to working in the United States. *E.g.*, 18 USC 1101. (108a; 132a).

Plaintiffs' constitutional arguments related to § 361(1) need not be considered here because review of the Court of Appeals' decision discloses they were waived for not having been presented below (122a-133a).

possibility without itself being placed in the position of breaking the law. Plaintiffs should not benefit as a result of creating such a situation.

E. Conclusion.

The Court should resolve the question of plaintiffs' entitlement to weekly benefits by holding: claimants who have no legitimate "wage earning capacity" and no legally-based expectation of actionable "wage loss" have no entitlement to weekly wage loss compensation under MCL 418.301(4). Alternatively, their weekly benefits are suspended due to their lack of employability attributable to their crimes of illegally procuring employment.

RELIEF

WHEREFORE, *amicus curiae*, Michigan Self-Insurers' Association, respectfully requests the Supreme Court affirm the Court of Appeals' denial of ongoing weekly wage loss benefits.

Respectfully submitted,

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